



1 The Court takes judicial notice of its files with respect to a prior habeas petition  
2 (the "Prior Petition") Petitioner filed in this Court on or about April 21, 2014, Case No.  
3 CV 14-3322 VAP (FFM). The Court notes that the Prior Petition was directed to the  
4 same conviction and/or sentence sustained in Los Angeles County Superior Court Case  
5 No. TA108801. On November 25, 2014, Judgment was entered in Case No. CV 14-3322  
6 VAP (FFM) denying the Prior Petition as time-barred and dismissing the action with  
7 prejudice.

8 The Petition now pending is governed by the provisions of the Antiterrorism and  
9 Effective Death Penalty Act of 1996 (Pub. L. 104-132, 110 Stat. 1214) ("the Act") which  
10 became effective April 24, 1996. Section 106 of the Act amended 28 U.S.C. § 2244(b) to  
11 read, in pertinent part, as follows:

12 "(1) A claim presented in a second or successive habeas corpus application  
13 under section 2254 that was presented in a prior application shall be  
14 dismissed.

15 (2) A claim presented in a second or successive habeas corpus application  
16 under section 2254 that was not presented in a prior application shall be  
17 dismissed unless --

18 (A) the applicant shows that the claim relies on a new rule of  
19 constitutional law, made retroactive to cases on collateral  
20 review by the Supreme Court, that was previously unavailable;  
21 or

22 (B)(i) the factual predicate for the claim could not have been  
23 discovered previously through the exercise of due diligence;  
24 and

25 (ii) the facts underlying the claim, if proven and viewed in  
26 light of the evidence as a whole, would be sufficient to establish  
27 by clear and convincing evidence that, but for

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1 constitutional error, no reasonable factfinder would have found  
 2 the applicant guilty of the underlying offense.

3 (3)(A) Before a second or successive application permitted by this section is  
 4 filed in the district court, the applicant shall move in the appropriate court of  
 5 appeals for an order authorizing the district court to consider the  
 6 application.”

7 Petitioner’s prior federal habeas petition was denied on the ground that it was  
 8 barred by the one-year period of limitation. A dismissal based on the statute of  
 9 limitations is considered an adjudication on the merits for purposes of determining  
 10 whether a subsequent petition is successive under the Act. *Reyes v. Vaughn*, 276 F. Supp.  
 11 2d 1027, 1029 (C.D. Cal. 2003); *see Plaut v. Spendthrift Farm*, 514 U.S. 211, 228, 115 S.  
 12 Ct. 1447, 131 L. Ed. 2d 328 (1995) (“The rules of finality, both statutory and judge made,  
 13 treat a dismissal on statute-of-limitations grounds the same way they treat a dismissal for  
 14 failure to state a claim, for failure to prove substantive liability, or for failure to  
 15 prosecute: as a judgment on the merits.”) (citing Fed. R. Civ. P. 41(b) and *United States*  
 16 *v. Oppenheimer*, 242 U.S. 85, 87–88, 37 S. Ct. 68, 61 L. Ed. 161 (1916)); *Ellingson v.*  
 17 *Burlington Northern Inc.*, 653 F.2d 1327, 1330 n.3 (9th Cir. 1981) (“A judgment based  
 18 on the statute of limitations is ‘on the merits.’”) (citing *Mathis v. Laird*, 457 F.2d 926,  
 19 927 (5th Cir. 1972)).

20 Therefore, because the Petition now pending challenges the same conviction as  
 21 Petitioner’s prior habeas petition in Case No. CV 14-3322 VAP (FFM), it constitutes a  
 22 second and/or successive petition within the meaning of 28 U.S.C. § 2244(b). To the  
 23 extent Petitioner seeks to pursue the same claims she previously asserted, the Petition is  
 24 barred by the provisions of 28 U.S.C. § 2244(b)(1). To the extent Petitioner seeks to  
 25 pursue claims not previously asserted, it was incumbent on her under § 2244(b)(3)(A) to  
 26 secure an order from the Ninth Circuit authorizing the District Court to consider the  
 27 Petition, prior to his filing of it in this Court. Petitioner’s failure to secure such an order  
 28 from the Ninth Circuit deprives the Court of subject matter jurisdiction.

1        “REFERRAL” OF HABEAS CORPUS PETITION TO NINTH CIRCUIT

2        Ninth Circuit Rule 22-3(a) states, in pertinent part, that “[i]f a second or successive  
3 petition or motion, or an application for authorization to file such a petition or motion, is  
4 mistakenly submitted to the district court, the district court shall refer it to the court of  
5 appeals.”

6        Therefore, to the extent the Petition was “mistakenly submitted” to this Court, the  
7 Petition must be referred to the court of appeals. However, it is unclear whether the  
8 district court may both “refer” the Petition to the Ninth Circuit and, at the same time,  
9 dismiss the Petition. After reviewing numerous district court cases in this circuit, this  
10 Court concludes that simultaneous referral and dismissal is appropriate. *See Cielto v.*  
11 *Hedgpeth*, 2014 WL 1801110 (C.D. Cal. Apr. 23, 2014).

12  
13        DENIAL OF CERTIFICATE OF APPEALABILITY

14        Rule 11(a) of the Rules Governing § 2254 Actions provides:

15            (a) Certificate of Appealability. The district court must issue or  
16 deny a certificate of appealability when it enters a final order  
17 adverse to the applicant. Before entering the final order, the  
18 court may direct the parties to submit arguments on whether a  
19 certificate should issue. If the court issues a certificate, the  
20 court must state the specific issue or issues that satisfy the  
21 showing required by 28 U.S.C. § 2253(c)(2). If the court denies  
22 a certificate, the parties may not appeal the denial but may seek  
23 a certificate from the court of appeals under Federal  
24 Rule of Appellate Procedure 22. A motion to reconsider a  
25 denial does not extend the time to appeal.

26        Here, given the Court’s ruling on settled legal issues, the Court does not require  
27 any arguments from the parties on whether a certificate of appealability (“COA”) should  
28 issue.

1 Under 28 U.S.C. § 2253(c)(2), a COA may issue “only if the applicant has made a  
2 substantial showing of the denial of a constitutional right.” Here, the Court dismissed the  
3 petition on the ground that it was a second or successive petition. Thus, the Court’s  
4 determination of whether a COA should issue is governed by the Supreme Court’s  
5 decision in *Slack v. McDaniel*, 529 U.S. 473, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000),  
6 where the Supreme Court held that, “[w]hen the district court denies a habeas petition on  
7 procedural grounds without reaching the prisoner’s underlying constitutional claim, a  
8 COA should issue when the prisoner shows, at least, that jurists of reason would find it  
9 debatable whether the petition states a valid claim of the denial of a constitutional right  
10 and that jurists of reason would find it debatable whether the district court was correct in  
11 its procedural ruling.” 529 U.S. at 484. As the Supreme Court further explained:

12 Section 2253 mandates that both showings be made before the court of  
13 appeals may entertain the appeal. Each component of the § 2253(c) showing  
14 is part of a threshold inquiry, and a court may find that it can dispose of the  
15 application in a fair and prompt manner if it proceeds first to resolve the  
16 issue whose answer is more apparent from the record and arguments.  
17 529 U.S. at 485.

18 Here, the Court finds that its ruling is not one in which “jurists of reason would  
19 find it debatable whether the district court was correct in its procedural ruling” that the  
20 Court has no jurisdiction over the Petition.

## 21 **ORDER**

23 Pursuant to Ninth Circuit Rule 22-3(a), the Court refers the habeas Petition to the  
24 U.S. Court of Appeals for the Ninth Circuit for consideration as an application for leave  
25 to file a second-or-successive habeas petition. The Clerk of Court shall send a copy of  
26 the habeas Petition and a copy of this Order to the Clerk of the U.S. Court of Appeals for  
27 the Ninth Circuit.

28 The Clerk of Court shall provide petitioner with a form recommended by the Ninth

1 Circuit for filing an Application for Leave to File Second or Successive Petition Under 28  
2 U.S.C. § 2254 or Motion Under 28 U.S.C. § 2255.

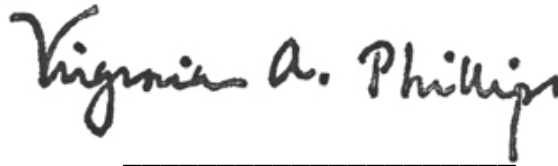
3 This action is then dismissed without prejudice for lack of subject-matter  
4 jurisdiction pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United  
5 States District Courts.

6 LET JUDGMENT BE ENTERED ACCORDINGLY.

7 A Certificate of Appealability is DENIED. This is a final order, but it will not be  
8 appealable unless Petitioner obtains a certificate of appealability from the U.S. Court of  
9 Appeals.<sup>2</sup>

10 As required by Fed. R. Civ. P. 58(a)(1), final judgment will be issued separately.

11  
12 DATED: May 27, 2015



VIRGINIA A. PHILLIPS  
United States District Judge

15 Presented by:

17 /S/ FREDERICK F. MUMM  
18 FREDERICK F. MUMM  
19 United States Magistrate Judge

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27 <sup>2</sup> See *Muth v. Fondren*, 676 F.3d 815, 822 (9th Cir. 2012) (citing 28 U.S.C. §  
28 2253(c)(1)(B)), see also Fed. R. App. P. 22(b)(1).